



STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
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DIVISION OF ENERGY

IN THE MATTER OF THE PETITION OF)	ORDER ON MOTION FOR
ATLANTIC CITY ELECTRIC COMPANY,)	INTERLOCUTORY REVIEW
D/B/A CONECTIV POWER DELIVERY, FOR)	
APPROVAL OF AMENDMENTS TO ITS)	
TARIFFS TO PROVIDE FOR AN INCREASE)	BPU DOCKET NO. ER03020110
IN RATES FOR ELECTRIC SERVICE)	OAL DOCKET NO. PUC 6917-02

(SERVICE LIST ATTACHED)

BY THE BOARD:

This matter is before the Board of Public Utilities ("Board") to consider a motion by Cogentrix Energy, Inc. ("Cogentrix"), seeking interlocutory review of Administrative Law Judge ("ALJ") Richard McGill's October 17, 2003 denial of Cogentrix's motion to intervene as a party in the above captioned matter. For the reasons set forth herein, the Board has determined to grant interlocutory review and modify the ALJ's decision and grant Cogentrix a limited intervention, limited to issues related to the Standby Electric Service ("SES") tariff rate charged to Logan Generating Company, LP ("Logan") and Carneys Point Cogeneration Limited Partnership ("Carneys Point"). In accordance with ALJ McGill's ruling, for all other issues presented in the proceeding, Cogentrix will have participant status pursuant to N.J.A.C. 1:1-16.6, limited to the right to file post-hearing briefs and to file exceptions and replies to exceptions to an Initial Decision.

Background and Procedural History

On August 1, 2002 Atlantic City Electric Company ("ACE" or "Company") filed a petition seeking recovery of the deferred balances authorized by the Board's July 15, 1999 Final Decision and Order - In the Matter of Atlantic City Electric Company – Rate Unbundling, Stranded Costs, and Restructuring Filings, BPU Docket Nos. EO97070455, EO97070456, EO97070457 ("Final Order") at 73. In accordance with the Final Order, on February 1, 2003, ACE filed a petition seeking an increase in its base rates for electric service. The deferred balances proceeding and the base rate case proceeding progressed on separate tracks.

The deferred balances petition was transmitted to the Office of Administrative Law ("OAL") on October 25, 2002 for determination as a contested case and assigned to Administrative Law Judge ("ALJ") Diana C. Sukovich for the purpose of conducting public and evidentiary hearings. Cogentrix sought intervention in that proceeding for similar reasons to those asserted herein. Cogentrix is a general partner in, and part-owner (50% and 10%, respectively) of the Logan and the Carneys Point cogeneration plants and pays its pro rata share of ACE's base rate charges for standby electric service to these facilities.

On December 9, 2002, ALJ Sukovich denied Cogentrix's motion and granted Cogentrix participant status in the deferred balances case. Cogentrix filed an interlocutory motion with the Board appealing the denial of intervenor status as well as certain deadlines set forth in ALJ Sukovich's prehearing order. By Order dated January 15, 2003, the Board granted interlocutory review and affirmed the ALJ's decision.

In its January 15, 2003 Order, the Board determined that while Cogentrix was a partner in two separate cogeneration facilities, neither the contract terms nor the rates paid by the facilities would be affected by the deferred balances proceeding. Thus, the Board found that the ALJ was correct in her finding that Cogentrix did not have a substantial interest in the outcome of that case.¹ Cogentrix filed a motion for reconsideration on January 30, 2003, which was subsequently denied by Board Order dated March 24, 2003.

ALJ Sukovich filed an Initial Decision in the deferred balances proceeding on June 2, 2003. The Board issued a Summary Order in the deferred balances case on July 31, 2003.²

ACE's base rate petition, filed on February 1, 2003, was also transmitted over to the OAL as a contested case and was assigned to ALJ Richard McGill. On June 2, 2003, Cogentrix moved to intervene in that proceeding based on its claim that as a partner in Logan and Carneys Point, responsible for a portion of the utility bills incurred by those entities under ACE's applicable standby tariff, it had a substantial interest in the outcome of the case. ACE filed a reply in opposition to the motion with the OAL on August 5, 2003, stating that as a passive investor in two Non-Utility Generation ("NUG") contracts, whose terms were not the subject of this proceeding, Cogentrix lacked a substantial interest in the outcome of the proceeding. In September 2003, Board Staff and the Division of the Ratepayer Advocate ("RPA"), filed submissions in support of Cogentrix's motion to intervene.

¹ The Board also found that the ALJ was correct in her determination that Cogentrix had not demonstrated that its interest was sufficiently different from that of the Independent Energy Producers of New Jersey ("IEPNJ"), which had been granted intervenor status.

² I/M/O the Petition of Atlantic City Electric Company d/b/a Conectiv Power Delivery for Approval of Amendments to Its Tariff to Provide for an Increase in Rates for Electric Service, BPU Docket No. ER02080510, OAL Docket No. PUC6917-02.

By Order dated October 17, 2003, ALJ McGill denied Cogentrix's motion. The ALJ determined that "the same situation exists in this proceeding" as existed in the deferred balances proceeding and therefore adopted the same reasoning utilized by the Board in its January 15, 2003 Order. As in the deferred balances proceeding, Cogentrix was granted participant status pursuant to N.J.A.C. 1:1-16.6, limited to the right to file post-hearing briefs and exceptions to an Initial Decision.

Pursuant to N.J.A.C. 1:1-14.10(b), on October 27, 2003 Cogentrix moved for interlocutory review by the Board of ALJ McGill's decision. Cogentrix asserts, among other arguments, that it should be granted intervention because the rate case will consider: (1) litigation costs incurred by ACE as a result of a dispute and arbitration proceeding with Logan concerning a disagreement over how Logan charges ACE for fuel used; and (2) increasing charges for standby service ACE provides to Logan and Carneys Point.

By letter dated November 3, 2003, ACE opposed the request for interlocutory review. It asserts, among other arguments, that: (1) there is no information which would allow a determination to be made regarding the relationship of the Company's bills to Logan and Carneys Point, and any payments that Cogentrix may or may not make to these two partnerships; (2) Logan and Carneys Point are the actual customers of ACE and neither chose to intervene in this matter as individual customers, but instead are participating through IEPNJ; and (3) Cogentrix is not the bill-paying entity.

On November 13, 2003, the Board determined to grant Cogentrix's motion for interlocutory review and requested that the OAL extend the time period for final disposition of the motion by 20 days, until December 8, 2003.

Discussion and Findings

The Board has carefully reviewed the moving papers in this proceeding, the request for interlocutory review, the responses filed by ACE, and ALJ McGill's October 17, 2003 ruling. While not convinced that Cogentrix's interests in this proceeding justify granting full intervention status, the Board is persuaded that a limited intervention related to the standby tariff rates charged to Logan and Carneys Point and participant status for all other issues, represents a fair and appropriate resolution of this motion.

Pursuant to N.J.A.C. 1:1-16.1, to be eligible for intervenor status, a party must demonstrate that it will be substantially, specifically and directly affected by the outcome of the proceeding. In ruling upon a motion to intervene, the Board must take into consideration: (1) the nature and extent of the movant's interest in the outcome of the case; (2) whether or not the movant's interest is sufficiently different from that of any party so as to add measurably and constructively to the scope of the case; (3) the prospect of confusion or undue delay arising from the movant's inclusion; and (4) other appropriate matters. N.J.A.C. 1:1-16.3(a).

Cogentrix's interest in this case derives from its ownership interest in the Logan and Carneys Point partnerships. While Logan and Carneys Point chose not to intervene in this matter as individual customers, as in the deferred balances proceeding, they are indirectly represented through their membership in IEPNJ.

Cogentrix asserts that while technically not ACE's customer, by virtue of its obligation to pay a substantial portion of the utility expenses incurred by Logan and Carneys Point, in essence it is a customer with a right to intervene. The Board finds that while Cogentrix is not a direct

customer of ACE, by virtue of its ownership interest in the partnerships, it does pay a considerable portion of the standby charges assessed to Logan and Carneys Point.

Unlike the deferred balances proceeding, which dealt with the limited issue of the recoverability of appropriate costs incurred by ACE as part of the restructuring of the electric utility industry, and which did not directly affect the rates paid by the two partnerships, ACE's base rate petition includes proposed increases to ACE's regulated rates and tariffs on a going forward basis in order that the utility may provide safe, adequate and proper service. More specifically, it includes proposed changes to the SES tariff rate charged to Logan and Carneys Point, which is paid in part by Cogentrix.

The Board finds that Cogentrix could be substantially affected by changes to the standby tariff charges, a portion of which it bears a responsibility for paying. Accordingly, the Board HEREBY MODIFIES the ALJ's ruling and HEREBY GRANTS Cogentrix a limited intervention with respect to this issue.

With respect to the legal expenses incurred by ACE in resolving a dispute with Logan concerning how Logan charges ACE for fuel used, the Board concurs with the ALJ that Cogentrix's intervention with respect to this issue would not add measurably and constructively to the scope of the case. As noted in the Board's recent Order Clarifying Issues and Directing the Filing of Supplemental Testimony ("Clarifying Order") in this docket dated December 12, 2003, the two issues related to the Logan plant which are presented in the rate case are: (1) whether the ongoing level of legal expenses previously allowed in base rates is sufficient to defray all or some portion of the Logan litigation costs; and (2) whether the Logan litigation costs should be recovered in base rates in accordance with past Board policy, or alternatively, reflected as an offset to the Logan recovery included in the NNC deferred balances. Clarifying Order at 3.

The Board is confident that a full and fair record can and will be made concerning the appropriateness of the legal expenses ACE incurred with respect to the Logan dispute. To the extent that Cogentrix wishes to comment on these issues, it is not precluded from doing so in post-hearing briefs and exceptions.

In conclusion, the Board HEREBY ADOPTS, with modification, the ALJ's October 17, 2003 decision on Cogentrix's motion to intervene for the reasons expressed therein. It HEREBY MODIFIES the ALJ's ruling and HEREBY GRANTS Cogentrix a limited intervention, limited solely to issues relating to the standby tariff rate charged to Logan and Carneys Point.

In accordance with the ALJ's ruling, the Board FURTHER ORDERS that for all other issues presented in this proceeding, Cogentrix shall be accorded participant status pursuant to N.J.A.C. 1:1-16.6, limited to the right to file post-hearing briefs and to file exceptions and replies to exceptions to an Initial Decision.

DATED: 1/26/04

BOARD OF PUBLIC UTILITIES
BY:

SIGNED

JEANNE M. FOX
PRESIDENT

SIGNED

FREDERICK F. BUTLER
COMMISSIONER

SIGNED

CAROL J. MURPHY
COMMISSIONER

SIGNED

CONNIE O. HUGHES
COMMISSIONER

SIGNED

JACK ALTER
COMMISSIONER

ATTEST:

SIGNED

KRISTI IZZO
SECRETARY